IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

CRIMINAL APPLICATION NO. 5715 OF 2004.

Mafatlal Finance Co.Ltd. ..Appellants.

vs.

1. Aminex Chemical Ltd.
2. Deepak M. Shah
3. Mahipat J.Shah
4. Mehul M.Shah
5. State of Maharashtra. ..Respondents.

Shri S.V. Marwadi i/b M/s R.K. Associates for the applicant.

Shri Ishwar S. Balgannavar with Shri Vishwanath Talkute and R.H. Joshi for respondent Nos. 2 to4.

Shri A.S. Shitole, A.P.P. for the State.

CORAM: V.M.KANADE,J.
DATED: 7-3-2005.

ORAL ORDER:

1. This is an application for leave to file appeal. Leave granted. Appeal is admitted. Taken up for final hearing forthwith.

2. The only question which requires to be decided in this appeal is as to whether the order passed by the trial Court dismissing the complaint for default under section 256 of the Code of Criminal Procedure was valid or not. The Counsel for the respondents has also filed the certified copies of the roznama as well as certified copy of all relevant documents filed in the trial Court.

3. It was made clear on 22.2.2005 that in the event application for condonation is allowed, the appeal shall be heard forthwith. Compilation filed by the applicant and the respondents are taken on record. Learned Counsel appearing for the applicant submits that the learned Magistrate has wrongly passed the order under section 256 of the Code of Criminal Procedure and that it was the duty of the Magistrate to dispense with attendance of the complaint if personal attendance is not necessary on that date. He further submitted that the learned Magistrates ought to have adjourned the hearing and given notice to the complainant before acquitting the accused. He relied upon judgment of the Supreme Court in the case of **Associated Cement Co. vs. Keshvanand reported in 1998 Cri.L.J. 856 (SC)**. He submitted that the complainant could not remain present as he was not aware that the case was transferred from 37th Court to 23rd Court, Esplanade, Mumbai. He further submitted that on earlier occasions when proceedings were stayed by virtue of the stay granted by the High Court and thereafter matter was again posted on board after dismissal of the writ petition, notices were issued by the Magistrate to both the parties. He submitted that the same procedure ought to have been followed. He relied upon number of judgments of the Supreme Court from the compilation which he was submitted by him.

4. Learned Counsel appearing for the respondents vehemently opposed the submissions made by the learned Counsel for the applicant. He submitted that the learned Magistrate had adjourned the matter on 4 dates after complainant and his advocate remained absent. He submitted that the complainant and his Advocate were not diligent and, therefore, benefit will have to given to the accused as substantive right was created in the accused after dismissal of the complaint.

5. In my view, for the reasons stated in the Criminal Application No. 5716 of 2004, there was some confusion created after case was transferred from one Court to another. The Supreme Court in the case of Associated Cement Co.Ltd.(supra) has observed in para 18 as under:

> "Reading the section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the section. First is, if the Court thinks in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other

> reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

6. From the perusal of the ratio in the said case it can be seen that duty is cast upon the Magistrate to exercise discretion vested in him fairly and judicially without impairing the cause of administration of criminal justice.

7. From the facts and circumstances of the case details of which are narrated in the order passed by me in Criminal Application No. 5716/2004, I have no manner of doubt that the Magistrate should not have resorted to dismissing the complaint under section 256 of the Code of Criminal Procedure, because presence of the complainant was not required when complaint was dismissed. The Magistrate could have recorded plea of the accused. The complainant had remained present before earlier Court i.e 37th Court regularly and had been diligent in pursing the case. Application for substitution was already filed when the matter was in 37th Court. The said application was still pending. In view of these facts, in my view, the Magistrate has acted in an arbitrary manner in dismissing the

complaint. The Magistrate could have issued notices to both the parties as was done by 37th Court on the earlier occasion. The ratio of the judgment in the case of Associated Cement Co. is squarely applicable to the facts of the present case. The impugned order is, therefore,set aside and quashed and complaint is restored to file. However, it must be noted that the complainant should have been more diligent and should have taken immediate search when the matter did not appear on board. Though there is no provision for imposition of costs under the Code of Criminal Procedure except under section 359, which is not applicable to the facts of the present case, taking into consideration the peculiar facts and circumstances of the case, I am of the view that the respondents should be compensated and I propose to impose costs on the complainant by exercising inherent jurisdiction of this Court under section 482 of the Criminal Procedure Code to meet the ends of justice. The complainant is, therefore, directed to pay costs quantified in the sum of Rs.20,000/- (twenty thousand). The payment of costs is a condition precedent which should be deposited in the trial Court within 4 weeks. The trial Court shall decide the case on merits as expeditiously as possible and in any event within a period of 3 months. The trial Court to fix the matter for hearing on 7th April 2005., Accused to remain present in the trial Court on the said date.

Certified copy expedited.